UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RENEE M. SULLIVAN, Plaintiff, v. MASSACHUSETTS BAY COMMUTER RAILROAD COMPANY, LLC, and PAUL BARE, Defendants.	)	CIVIL ACTION NO. 07-cv-10875-DPW

MEMORANDUM AND ORDER
April 22, 2009

Plaintiff Renee Sullivan brings this action against Defendants Massachusetts Bay Commuter Railroad Company, LLC ("MBCR") and former foreman Paul Bare, alleging she was subjected to sexual harassment at her workplace and was later wrongfully terminated in retaliation for filing a complaint. Sullivan asserts claims against MBCR for sexual harassment, sex discrimination, and retaliation, under both 42 U.S.C. § 2000e *et seq*. ("Title VII") and Mass. Gen. Laws ch. 151B ("Chapter 151B"). Sullivan also asserts claims against Bare individually for sexual harassment and sex discrimination under Chapter 151B.[1] Defendants have moved for summary judgment on all of Sullivan's claims, contending that no harassment occurred and that Sullivan was terminated for poor job performance. For the reasons discussed below, I will deny Defendants' summary judgment motion

[1] At the hearing on November 14, 2007, I dismissed Sullivan's claims under Title VII against Bare individually (Counts VII and VIII), and also dismissed Sullivan's claims under Mass. Gen. Laws ch. 214, § 1C against both Defendants (Counts IX and X).

as to Sullivan's sexual harassment claims (Counts II, IV, VI), but I will grant summary judgment as to Sullivan's sex discrimination claims (Counts I, III, V) and retaliation claims (Counts XI, XII).

I. BACKGROUND[2]

A. The Parties

Plaintiff Renee Sullivan is a former railroad coach cleaner, whose employment was involuntarily terminated by MBCR in January 2005. Defendant MBCR is a Massachusetts corporation that assumed control of operations of the Massachusetts commuter rail in 2003. Defendant Paul Bare is a former MBCR foreman, who was responsible for supervising coach cleaners at the facility where Sullivan worked immediately prior to her termination.

B. Sullivan's Employment as a Coach Cleaner

Sullivan began work as a coach cleaner for Amtrak in 1997. When MBCR took over operations of the Massachusetts commuter rail in 2003, Sullivan retained her position and became an employee of MBCR. From approximately 2001 through her termination in January 2005, Sullivan worked at the commuter rail facility in Middleborough, Massachusetts.

At Middleborough, Sullivan worked the late night shift from 8 p.m. to 4 a.m. five days a week. The facility consisted of a train yard, where four trains were kept overnight, and a shop

[2] In the following factual discussion, I draw all reasonable inferences in favor of Sullivan.

building, which contained a garage, a small office, and a break room. According to Sullivan, the yard was large and not well lit; she describes it as a "very dark, desolate, isolated area." As the only coach cleaner working during her shift, Sullivan was responsible for cleaning all six to seven cars on each of the four trains at the yard. Her duties included picking up trash, sweeping, mopping, and wiping down surfaces, as well as cleaning and stocking the bathrooms. There were usually three other people working at the facility during Sullivan's shift: a mechanic, an electrician, and a car man.

C. Sullivan's Attendance Issues

While working for MBCR, Sullivan had many problems with unauthorized absenteeism. According to Sullivan, her frequent absences from work were primarily due to her ongoing child care and family obligations. Sullivan had four children, who in 2005 ranged in age from three to sixteen.

On August 6, 2003, Sullivan received a written warning from MBCR for repeatedly leaving during her shift without authorization. The warning advised that "[i]f working this particular shift or location poses a problem, or is inconvenient for you, there is always the option of bidding on another job that is convenient or feasible for you." On December 28, 2003, Sullivan was formally reprimanded for leaving her post early without permission again, and she signed a waiver acknowledging

that her job performance would thereafter be periodically reviewed for the next year.

Sullivan's attendance problems continued in 2004. Between January 1, 2004 and October 20, 2004, Sullivan called in sick on thirty-two occasions, left early from her shift on three occasions, and missed work without notifying her employers on six occasions. On July 29, 2004, Sullivan failed to attend a disciplinary hearing regarding three unauthorized absences and was assessed a three-day suspension. The suspension was deferred for up to six months, at which time it was to be dismissed if Sullivan had not committed any subsequent offenses.

On October 13, 2004, Sullivan received a notice charging her with additional unauthorized absences in the previous two months and falsifying information on her time cards. At the disciplinary hearing for these charges, Sullivan executed a form waiving her right to a formal investigation and agreeing to accept a twenty-five day suspension.[3] The waiver expressly indicated that the suspension was Sullivan's "final warning," and that any offense committed in the next six months could result in her dismissal. Sullivan began her suspension on October 20, 2004; she returned to work on November 24, 2004.

D. Sullivan's Interactions with Paul Bare

[3] Sullivan contends that she signed this waiver "under duress," because she was told she would lose her job if she did not sign it.

On November 10, 2004, Paul Bare became the MBCR foreman with responsibility for supervising coach cleaners on the late night shift at three train yards, including the Middleborough facility where Sullivan worked. Bare was responsible for ensuring that the coach cleaners under his supervision properly cleaned the train cars, and he apportioned his time among the three locations depending on the needs of each facility. Bare worked during the same shift as Sullivan on six days in late November and early December 2004. According to Sullivan, Bare rarely left the Middleborough facility while she was working there.

Sullivan first met Bare at the beginning of her shift on Wednesday, November 24, 2004, the day she returned from her suspension. According to Sullivan, after Bare finished discussing her coach cleaning duties with her, he told her that he was aware of her problematic disciplinary history and "made a smug remark about maybe working something out" with her. Although Sullivan was not precisely certain what Bare meant to convey with the remark, she "took great offense" to it and immediately "didn't care for [him]." Sullivan has also indicated that Bare followed her around during the remainder of her shift that night and that she "tried to avoid" him.[4]

[4] During her deposition, Sullivan recounted - based on a journal she had written earlier - that Bare "follow[ed] [her] everywhere" on the *evening* of November 25, 2004. That asserted timing conflicts with other evidence indicating that neither Bare nor Sullivan worked November 25, which was Thanksgiving. Given the confusion evident elsewhere during Sullivan's deposition

Sullivan next worked the same shift as Bare on Sunday, November 28, 2004. While Sullivan was cleaning a train car that night, she noticed Bare driving his car alongside the train, following her progress and observing her while she worked.[5] Bare did not enter the train while Sullivan was on it, nor did he speak with her at all that night.

Sullivan and Bare worked together again on Wednesday, December 1, 2004.[6] Sullivan alleges that at some time after midnight during her shift, while she was bending over to clean part of a train car, Bare approached her from behind, startled her and said, "Nice view." Sullivan says she gave Bare a dirty look, then left the train to call one of her union representatives, Kevin Murray. After Sullivan described this encounter to him, Murray recommended that Sullivan leave the facility for the remainder of her shift and mark her time card with the time that she left.

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testimony as to the proper date to describe her overnight shifts, I find that Sullivan likely intended to refer to the early *morning* of November 25, which would have been after midnight on her November 24 shift.

[5] According to Bare, he sometimes drove his car around the trains at the facilities he supervised in order to look through the windows and determine which train cars still needed to be cleaned.

[6] At the hearing in this matter, Defendants' counsel indicated that the precise timing of Sullivan and Bare's encounters is disputed, and that the events alleged to have occurred during the December 1 shift could only have occurred during the December 2 shift. I find it unnecessary to determine the correct date for purposes of resolving the instant motion.

Sullivan and Bare worked together again on Friday, December 3, 2004. Sullivan says she was unpleasantly "shocked" to see Bare at Middleborough that day because the foreman typically does not work Friday or Saturday shifts.[7] Sullivan alleges that Bare followed her around the trains throughout her shift. At times, Bare would startle Sullivan by sitting in one of the train cars, silently watching her while she cleaned.[8] In several of the cars where Bare followed and watched Sullivan, the lights had been turned off because electrical work was being done to service the trains. According to Sullivan, "Everything about his behavior made me nervous. The way he would stare and follow – it's creepy and it's the middle of the night. I'm by myself and I'm a woman. Everywhere I turned he was right there." Bare left the Middleborough facility that night around 9:30 p.m., then returned at around 1 a.m., accompanied by Jackie MacNeil, who was the General Foreman and Bare's direct supervisor. Upon seeing Bare return, Sullivan was so upset that she went into the break room and did not leave until the end of her shift.

The final day that Sullivan and Bare worked together was Sunday, December 5, 2004. After Bare inspected a train Sullivan

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[7] Bare says he was working an overtime shift on December 3, 2004, because he had to provide orientation to a new coach cleaner at a different facility.

[8] According to Sullivan, all of her previous supervisors at the train yard waited until the cars were cleaned before inspecting her work.

had cleaned, he instructed her to return to the train for a light sweep and to replenish toiler paper in the bathroom. While Sullivan was performing these tasks, Bare approached her on the train car, holding an unopened condom wrapper, shaking it, and asking her if she "ever found any of these." According to Sullivan, this encounter upset her so much that she went to the shop building and stayed there for the duration of her shift. Following this event, Sullivan again called Kevin Murray, her union representative, and informed him that she felt "extremely unsafe" at her workplace. Murray suggested that Sullivan contact Michael James, then the Chief of the MBCR's Equal Opportunity and Diversity Office.

E. Reports by Bare and MacNeil Regarding Sullivan

Following the late night shifts on both December 1, 2004, and December 3, 2004, Bare wrote reports to his supervisors concerning Sullivan's conduct. In the report concerning the December 1, 2004 shift - the night Sullivan left work following Bare's "nice view" comment - Bare indicated that he last saw Sullivan at 1 a.m. and later discovered she had left the facility without informing him. Bare noted that "[a]ll sets in the yard needed sweeping, spot mopping or toilets in need of servicing . . . [and] there were many trash bags left on the ground that should have been placed in the dumpster." Bare submitted the report to Jackie MacNeil, the General Foreman, on December 3, 2004.

In Bare's report concerning the December 3, 2004 shift - the night Sullivan alleges that Bare followed her on unlit train cars and silently watched her clean - Bare described the state of the Middleborough facility when he returned to it at 1 a.m. Bare wrote that he found train cars "in need of sweeping, spot mopping and toilet servicing." Bare "concluded that Rene (sic) Sullivan was not performing any work on these sets, or any work at all," and indicated that he would deduct three hours of wages from Sullivan's pay for that night. Bare submitted this report to Jackie MacNeil and to Robert McNemar - the MBCR Manager of Cleaning and Quality Control - on December 4, 2004.

Jackie MacNeil also wrote a report regarding her observations of the Middleborough facility on December 3, 2004. MacNeil confirmed that when she and Bare arrived at the facility that night, all of the trains needed additional cleaning and Sullivan was not working on them. MacNeil also indicated that around 2:30 a.m., after waiting for Sullivan to resume her work, she went inside the shop building to use the restroom and knocked on the door to the office, but there was no answer. MacNeil submitted her report to Robert McNemar and Mattie Allen - the Administrator for Discipline and Hearings for the MBCR's Mechanical Department - on December 6, 2004.

F. Sullivan's Harassment Complaint

Following her conversation with Kevin Murray regarding the

condom wrapper incident on December 5, 2004, Sullivan called Michael James, the Chief of the MBCR's Equal Opportunity and Diversity Office. Sullivan left a voice mail message for James indicating only her name, her phone number, and her workplace. When James did not call her back, Sullivan called and left another message on Wednesday, December 8, 2004, the next day that she was scheduled to work. James called Sullivan back around 1 p.m., and Sullivan spoke briefly with him about her experiences with Bare, telling James that Bare had been "inappropriate" and that she felt "unsafe" at the Middleborough facility. James told Sullivan he was "very busy" and that he would call her back that Friday (December 10, 2004) to discuss the situation further.

At 7:57 p.m. on December 8, 2004, three minutes before the scheduled start of her shift, Sullivan faxed a note to James, stating: "MBCR, I am no longer comfortable working at the company at the Middleboro facility. Since returning to work on 11-24-04 my foreman Paul Baer (sic) has discriminated against me and has made very inappropriate comments I find to be harassing. Formal charges will follow." At the bottom of the fax, Sullivan added: "Michael James, I am sending this fax after speaking with you this afternoon at 1:00 PM."[9] Sullivan, who says she was "concerned for [her] safety," did not appear for her shift that

[9] Although Sullivan indicated at her deposition that she may have also sent this fax to Robert McNemar, she has produced no evidence to this effect.

night, nor did she appear for any future scheduled shifts thereafter.

When Sullivan did not hear back from Michael James on Friday, December 10, 2004, she called him again and left another voice mail message. James did not return Sullivan's call until the following Monday, December 13, when he indicated that he would send her some paperwork. On December 14, 2004, James sent Sullivan a letter, asking her to fill out a Harassment Complaint form and requesting her presence at a meeting to discuss her situation on December 22, 2004. When Sullivan received the letter, she called James to explain that she would be unable to meet with him on that date due to child care issues and the short notice of his request. Sullivan and James agreed to speak again after the holidays.

G. MBCR's Investigation and Termination of Sullivan

On December 21, 2004, Mattie Allen, the Administrator for Discipline and Hearings for the MBCR's Mechanical Department, sent a Notice of Formal Investigation to Sullivan. The notice indicated that a hearing was scheduled for December 27, 2004, to determine Sullivan's responsibility for: (1) leaving her shift without authorization in the early morning of December 2, 2004; (2) failing to perform her job duties during her shift on December 3, 2004; and (3) failing to report for any of her shifts from December 9 through December 20, 2004. According to

Sullivan, she did not receive this notice until December 27, the day the hearing was scheduled to occur. At the request of Thomas Murray, Sullivan's union representative,[10] the hearing was postponed until January.

On January 6, 2005, MBCR Hearing Officer Richard Herz conducted the investigative hearing into the charges against Sullivan. Sullivan was herself unable to attend the hearing due to child care issues, but she was represented by Thomas Murray, who indicated that Sullivan was amenable to the hearing proceeding in her absence. Both Bare and Jackie MacNeil testified for MBCR at the hearing; Murray cross-examined both witnesses but did not call any witnesses on Sullivan's behalf.

At the close of the hearing, Murray requested that Herz defer any determination of Sullivan's culpability pending the result of MBCR's investigation into Sullivan's allegations of harassment by Bare. Although Herz indicated that he did not think Sullivan's harassment complaint would have any bearing on Charge 1 (leaving her shift early on December 2) or Charge 2 (failing to complete her duties on December 3), he promised to contact the Equal Opportunity and Diversity Office before deciding whether to proceed. Later the same day, Herz spoke with Michael James, who told him that Sullivan had failed to attend the scheduled meeting on December 22, 2004, to discuss her

[10] Both Kevin Murray and Thomas Murray were union representatives for Sullivan.

complaint[11] and had not responded to subsequent attempts to reach her by telephone.[12] Herz also looked into Sullivan's work schedule and discovered that she had only worked on the same shift as Bare on six days.

Based on this information, Herz informed Thomas Murray that he would not defer his resolution of the investigation, and on January 18, 2005, he issued a formal Decision Letter. In this letter, Herz concluded that based on Sullivan's "seeming reluctance to cooperate in any way with the Company's endeavors to investigate this most serious matter, [her] allegations against Foreman Bare can only be perceived as a self-serving attempt to circumvent the discipline process after ascertaining that the Company knew of the events of December 2 and 3." Herz also wrote to Sullivan: "I find the Company proved you were in violation of each of the three (3) charges cited in the Notice of Formal Investigation dated December 21, 2004. There does not appear to be any source of mitigation for your activities on any of the dates in question." Based on these conclusions, MBCR ordered Sullivan's dismissal, effective immediately.

H. Investigation of Sullivan's Harassment Complaint

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[11] From Herz's account, it does not appear that James told Herz anything about Sullivan's telephone call explaining her reasons for postponing the December 22 meeting.

[12] Sullivan denies ever receiving any telephone messages from James during the time period he claims he was attempting to reach her.

On January 19, 2005, Sullivan and Thomas Murray finally met with Michael James and Delvine Okereke - the Manager of MBCR's Equal Opportunity and Diversity Office. Although Herz's Decision Letter regarding Sullivan's termination had already been issued, Sullivan had not yet received it. At the meeting, Sullivan completed an internal MBCR Harassment Complaint form, describing the details of her encounters with Bare. According to Sullivan, James was uncooperative during the meeting, treating her in a condescending manner and acting skeptical of her allegations regarding Bare's conduct. The Equal Opportunity and Diversity Office investigated Sullivan's complaint by interviewing co-workers at the Middleborough facility. The office concluded that there was no evidence to support Sullivan's claims.

On February 2, 2005, Sullivan filed a timely Charge of Discrimination with the Massachusetts Commission Against Discrimination ("MCAD") and the United States Equal Employment Opportunity Commission ("EEOC"), charging MBCR with hostile work environment sexual harassment and retaliation in violation of Title VII and Chapter 151B. On June 21, 2006, the MCAD issued a "Lack of Probable Cause" determination with respect to Sullivan's claims, which was affirmed following Sullivan's appeal. On November 24, 2006, the EEOC adopted the findings of the MCAD and dismissed Sullivan's complaint. On May 8, 2007, Sullivan filed her complaint in this action against MBCR and Bare, bringing federal and state claims for sexual harassment, sex

discrimination, and retaliation.

II. SUMMARY JUDGMENT STANDARD

A court must grant summary judgment when it concludes based on the "the pleadings, the discovery and disclosure materials on file, and any affidavits . . . that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine" factual issue is one that "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A fact is "material" when it "carries with it the potential to affect the outcome of the suit under the applicable law." *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993).

In making its summary judgment inquiry, the court "must eye all reasonable inferences in the light most congenial to the nonmovant." *Mack v. Great Atlantic & Pacific Tea Co., Inc.*, 871 F.2d 179, 181 (1st Cir. 1989) (internal quotation omitted). In cases involving employment discrimination, "where elusive concepts such as motive or intent are at issue, summary judgment is not a favored tool." *Luciano v. Coca-Cola Enters., Inc.*, 307 F. Supp. 2d 308, 317 (D. Mass. 2004) (internal quotation omitted). Nonetheless, "[t]hough the movant's burden is heavy, an opponent may not rest upon her laurels (or her pleadings), but must set forth specific facts showing that there is a genuine

issue for trial." *Mack*, 871 F.2d at 181. (internal quotation omitted). The judicial function in conducting its evaluation is not to weigh the evidence and determine the truth of the matter, but rather to determine whether the evidence presented is such that a jury "could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 249, 255.

III. DISCUSSION

Sullivan's claims against Defendants fall into three categories: (1) sexual harassment by MBCR and by Bare individually; (2) sex discrimination by MBCR and by Bare individually; (3) retaliation by MBCR. For each category, Sullivan has brought a claim against MBCR under both Title VII and Chapter 151B; both of her claims against Bare individually are state law claims under Chapter 151B. I will consider each category of claims in turn.

A. Sexual Harassment

Sullivan alleges that Bare's behavior violated Title VII and Chapter 151B because it was sufficiently pervasive and severe to create a hostile work environment.[13] Defendants argue that

[13] There are two types of impermissible employer sexual harassment under Title VII and Chapter 151B: (1) "quid pro quo" sexual advances or requests that are made an explicit or implicit condition of employment or a basis for employment decisions; and (2) conduct of a sexual nature that creates a hostile work environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (Title VII); *Ramsdell v. Western Mass. Bus Lines, Inc.*, 415 Mass. 673, 676-77 (1993) (Chapter 151B). Although Bare's alleged statement upon meeting Sullivan that they could "work

Sullivan's evidence of a hostile work environment is insufficient as a matter of law to constitute sexual harassment under either of the statutes. Defendants also contend that MBCR's reasonable efforts to prevent and correct any alleged harassment, combined with Sullivan's failure to cooperate with their investigation, provide an affirmative defense to Sullivan's Title VII claims against MBCR.

1. Hostile Work Environment

a. Legal Standard

Title VII and Chapter 151B share the same basic framework for evaluating whether a plaintiff has been subjected to a hostile work environment.[14] *See Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 212 (D. Mass. 2006). The First Circuit has explained: "In order to prove a hostile work environment, a plaintiff must show that she was subjected to severe or pervasive harassment that materially altered the conditions of her employment." *Noviello v. City of Boston*, 398 F.3d 76, 92 (1st Cir. 2005). Furthermore, "[t]he harassment must be 'objectively and subjectively offensive, one that a reasonable

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something out" regarding her past disciplinary problems arguably implicates "quid pro quo" harassment, Sullivan has based her sexual harassment claims only on the creation of a hostile work environment. Because I find that Bare's comment, standing alone, is too vague to support a "quid pro quo" harassment claim, I will direct my analysis only to hostile work environment harassment.

[14] The two statutes do have some differences, primarily with respect to employer liability. *See* Section III.A.2, *infra*.

person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" *Id.* (*quoting Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)).

Determining the point at which an employer's conduct renders a work environment hostile or abusive is a fact-intensive inquiry that "does not depend on any 'mathematically precise test.'" *Billings v. Town of Grafton*, 515 F.3d 39, 48 (1st Cir. 2008) (*quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)). Rather, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Id.* (internal quotations omitted). The relevant circumstances "'may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance,' but are by no means limited to them, and 'no single factor is required.'" *Id.* (*quoting Harris*, 510 U.S. at 23).

Accordingly, "the hostility vel non of a workplace does not depend on any particular kind of conduct; indeed, '[a] worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed.'" *Id.* (*quoting Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996)). For example, in *Billings* the First Circuit held that "for a male supervisor to stare repeatedly at a female

subordinate's breasts" could constitute sexual harassment by creating a hostile work environment. *Id.* at 49-50. Nor is there any quantitative requirement on the number of incidents of harassment that must occur before an environment can be considered "hostile" for purposes of Title VII or Chapter 151B. *See Noviello*, 398 F.3d at 84 ("[A] single act of harassment may, if egregious enough, suffice to evince a hostile work environment."); *see also Gnerre v. Mass. Comm'n Against Discrimination*, 402 Mass. 502, 507-08 (1988).

The thrust of the hostile work environment inquiry "is to distinguish between the ordinary, if occasionally unpleasant, vicissitudes of the workplace and actual harassment." *Noviello*, 398 F.3d at 92. The question of whether a plaintiff was subjected to an objectively hostile environment should generally be determined by the finder of fact, "assess[ing] the matter on a case-by-case basis, weighing the totality of the circumstances." *Id.* at 94. The court's function "is one of screening, that is, to determine whether on particular facts, a reasonable jury could reach such a conclusion." *Id.* *See also Billings*, 515 F.3d at 47 n.7. Summary judgment remains, however, "an appropriate vehicle for policing the baseline for hostile environment claims." *Pomales v. Celulares Telefonica, Inc.*, 447 F.3d 79, 83 (1st Cir. 2006) (internal quotation omitted).

b. Bare's Alleged Conduct

Although Bare and Sullivan only worked together on the same job site for six days, I find that a reasonable jury could conclude from the totality of the circumstances that Bare's conduct constituted sexual harassment creating a hostile work environment for Sullivan.

Sullivan claims that at her very first meeting with Bare as her new supervisor, he made an offensive offer to "work something out" with her regarding her past disciplinary problems. On two other occasions, Bare made comments to Sullivan that were more directly sexual in nature. Sullivan claims that Bare startled her from behind while she was bending over to clean a part of a train car, and remarked, "Nice view." Several days later, Bare approached Sullivan while she was cleaning a bathroom on a train car, wiggling a condom wrapper at her and asking if she "ever found any of these." Each of these comments was directed to Sullivan personally - indeed, she was the only other person present on each occasion. *Cf. Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 541 (1st Cir. 1995) (noting that offensive sexual comments delivered to an assembly were not as severe as comments directed at individuals).

Sullivan also claims that Bare made her uncomfortable by following her around and staring at her while she worked. On her first shift with Bare - November 24, 2004 - he allegedly followed her so much that she made an effort to try to avoid him. During

the next shift she worked with Bare, Sullivan saw him following along with her outside the train, watching her from his car as she cleaned. Sullivan claims that during her shift on December 3, 2004, Bare followed her throughout the trains while she cleaned, even on some cars that were unlit. At times Bare startled Sullivan by silently sitting in a dark train car and watching her work. Sullivan explained, "Everything about his behavior made me nervous. The way he would stare and follow – it's creepy and it's the middle of the night. I'm by myself and I'm a woman. Everywhere I turned he was right there."

Defendants note that one of Bare's primary responsibilities as foreman was supervising Sullivan's cleaning duties, and that much of the conduct Sullivan complains of - e.g., Bare following her and watching her on train cars while she worked - was not expressly sexual. The First Circuit has noted that while "many different forms of offensive behavior may be included within the definition of hostile environment sexual harassment . . . the overtones of such behavior must be, at the very least, sex-based, so as to be a recognizable form of sex discrimination." *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 441 (1st Cir. 1997). In *Cody v. Sutar*, No. Civ.A. 95-6402-E, 1997 WL 109563 (Mass. Super. March 11, 1997), for example, a Massachusetts court held that derogatory comments about the plaintiff's hair and appearance, standing alone, were not sufficiently "sexualized" to

constitute hostile work environment harassment under Chapter 151B. *Id*. at *3. A defendant's conduct should not, however, be evaluated as a series of discrete and isolated acts, but should rather be viewed in the context of the entire chain of events giving rise to a plaintiff's claim. *See Hernandez-Payero v. Puerto Rico*, 493 F. Supp. 2d 215, 224 (D.P.R. 2007) (holding that an unwelcome visit to the plaintiff's workplace could support a sexual harassment claim when viewed in conjunction with earlier sexual comments and conduct); *see also De Almeida v. Children's Museum*, No. Civ.A 99-0901-H, 2000 WL 96497 (Mass. Super. Jan. 11, 2000) ("[W]here hostile environment sexual harassment is alleged . . . the totality of the defendant's conduct must be evaluated, not simply individual acts viewed in isolation, since it is the cumulative effect of the defendant's conduct that creates the hostile work environment.").

In this case, the context of Bare's alleged conduct supports Sullivan's claim that it was subjectively and objectively sexually offensive to the point where it unreasonably interfered with her job performance. It is noteworthy that Bare and Sullivan did not work in the hallways of a populated, well-lit office building. Rather, Bare allegedly followed and stared at Sullivan on otherwise empty train cars, some of which were unlit, late at night in the middle of a large and unpopulated train yard. There were generally only three other employees at the

Middleborough facility during Sullivan's shifts, and Sullivan was the only one at the site responsible for cleaning the inside of the train cars. When Bare's actions are viewed in conjunction with his suggestive offer to "work something out" with Sullivan, his apparently sexually charged "nice view" remark, and his wiggling of a condom wrapper while Sullivan was working alone in a train car bathroom, a reasonable jury could conclude that his other behavior also had sexual "overtones."

Defendants further argue that all of Bare's conduct, taken together, was not sufficiently severe or pervasive to "materially alter" the conditions of Sullivan's employment. It is true that the short period of time over which conduct occurred can weigh against finding that a fellow employee created a hostile work environment. *See Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 82 (1st Cir. 2001) ("[T]he greatly abbreviated *four-day* period . . . substantially undermined [plaintiff's] contention that the [defendant's] conduct was either sufficiently frequent or severe.") (emphasis in original). It is also true that Bare's alleged conduct, which did not involve any direct physical contact or express sexual solicitation, is less egregious than conduct found to constitute harassment in many other hostile work environment cases. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (finding a hostile work environment where repeated sexual demands by plaintiff's supervisor led to

40-50 instances of intercourse); *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 287 n.4 (1997) (finding a hostile work environment where the defendant allegedly grabbed the plaintiff's genitals and fondled other private areas). As the First Circuit has explained, however, particularly egregious examples of actionable sexual harassment, although potentially "instructive," "do not suggest that harassing conduct of a different kind or lesser degree will necessarily fall short of that standard." *Billings*, 515 F.3d at 49.

Furthermore, there is ample evidence in this case from which a juror could reasonably conclude that Bare's conduct materially affected Sullivan's ability to perform her job. On December 1, 2004, when Bare made his "nice view" remark, Sullivan was sufficiently upset that she immediately called her union representative and left for the remainder of her shift. On December 3, 2004, when Bare returned to the Middleborough facility after following and staring at Sullivan earlier in the evening, Sullivan was so nervous about encountering him again that she effectively hid in the shop building until the end of her shift. Finally, and most significantly, following Bare's remark about the condom wrapper, Sullivan told both her union representative and Michael James, the MBCR Chief of the Equal Opportunity and Diversity Office, that she no longer felt safe or comfortable enough around Bare to continue working at the

Middleborough facility in his presence. Sullivan thereafter stopped reporting to work altogether. This case is therefore distinguishable from cases cited by Defendants where courts concluded that allegedly harassing conduct had *not* unreasonably interfered with the plaintiff's work performance. *See, e.g., Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 46 (1st Cir. 2003) (noting "significantly" that the complained-of conduct "was never, according to the record, an impediment to [plaintiff's] work performance"); *Morgan v. Mass. Gen. Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990).

A reasonable jury evaluating the evidence described above might, as Defendants argue, find that Bare was simply doing his job of keeping a close eye on Sullivan's work performance, particularly given her history of absenteeism and failure to complete her duties. A reasonable jury might also conclude that a hypothetical reasonable person in Sullivan's situation would not have found Bare's conduct objectively offensive enough to materially alter the conditions of her employment. Nonetheless, granting all reasonable inferences in favor of Sullivan, I cannot conclude as a matter of law that no reasonable fact-finder could find Bare's conduct sufficiently severe or pervasive to constitute sexual harassment by creating a hostile work environment. *See Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 19 (1st Cir. 2002) ("Subject to some policing at the outer bounds,

it is for the jury to weigh those factors and decide whether the harassment was of a kind or to a degree that a reasonable person would have felt that it affected the conditions of her employment.") (internal quotation omitted).

2. MBCR's Title VII Affirmative Defense

Both Title VII and Chapter 151B make employers vicariously liable for hostile work environments created by a plaintiff's supervisor, such as Bare. *See Noviello*, 398 F.3d at 95. The Supreme Judicial Court of Massachusetts has held that under Chapter 151B, employers are strictly liable for supervisory harassment. *Id.* (*citing College-Town v. Mass. Comm'n Against Discrimination*, 400 Mass. 156, 162-69 (1987)). Title VII, on the other hand, affords an employer a possible affirmative defense to supervisory harassment, familiarly known as the *Faragher/Ellerth* defense. *Id.* at 94. In order to qualify for this defense, first, the employer must show that it "exercised reasonable care to prevent and correct promptly" the harassment. *Id.* (*quoting Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)). Second, the employer must show that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 95 (*quoting Ellerth*, 524 U.S. at 765).[15]

[15] I am unconvinced by Sullivan's argument that this affirmative defense is not applicable in this case because "the supervisor's harassment culminate[d] in a tangible employment action, such as discharge, demotion, or undesirable

Defendants contend that MBCR's Equal Opportunity and Diversity Office had an established system for reporting and investigating harassment claims, and that Sullivan's failure to cooperate more fully with these efforts delayed the MBCR's investigation and "deprived MBCR of an opportunity to respond in any meaningful fashion to her allegations." According to Sullivan, however, MBCR's efforts to respond to her complaint were lethargic at best. On several occasions, Michael James followed up regarding Sullivan's communications only after she called him more than once. Defendants do not dispute that James received a fax from Sullivan on December 8, 2004, indicating that she was sufficiently upset as a result of Bare's conduct that: (1) she no longer felt comfortable working at the Middleborough facility, and (2) she intended to pursue "formal charges." Yet even after receiving this information, James did not contact Sullivan again until December 13, 2004 - five days later - at which time he mailed her a form that he asked her to complete and return. There is no evidence that James, recognizing the seriousness of Sullivan's charges, made contact with anyone at Sullivan's work site to inquire further into her situation. Nor

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reassignment." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Putting aside the question of whether Sullivan has raised a genuine issue of fact that she was terminated as retaliation for filing a harassment complaint against Bare - *see* Section III.C, *infra* - there is no evidence to indicate her termination was itself a form of supervisory sexual harassment motivated by gender discrimination.

is there any evidence that James made more than perfunctory efforts affirmatively to gather additional information from Sullivan herself. James simply notified Sullivan by mail, with very little notice, that he was able to meet with her on December 22, in the midst of the holiday season. When Sullivan could not attend due to child care issues, the meeting was eventually postponed almost a month, until January 19, 2005.

I cannot conclude as a matter of law given this evidence that MBCR acted promptly to prevent and correct the alleged harassment. In *Cerqueira v. Corning Net Optix*, No. Civ.A. 03-10306-DPW, 2004 WL 1932758 (D. Mass. Aug. 13, 2004), by contrast, the defendant employer began investigating the plaintiff's harassment complaint within a day of receiving the complaint, seeking out additional information from the plaintiff and his coworkers. *Id*. at *6-7. It is true, as Defendants note, that Sullivan did little to avail herself of the opportunities MBCR did offer to pursue her complaint in a more timely fashion. For example, Sullivan waited until her meeting with Michael James and Delvine Okereke on January 19 to complete the formal Harassment Complaint form she received from James in the mail, and she did not attend the January 6 disciplinary hearing at which her union representative argued that Bare's harassment was a potential mitigating circumstance for her unauthorized absences from work. For the *Faragher/Ellerth* defense to be applicable, however, the

defendant must show *both* that it exercised reasonable care to prevent and correct the alleged harassment *and* that the plaintiff failed to cooperate. Although the evidence of Sullivan's cooperation is hardly overwhelming, I cannot grant summary judgment to Defendants on the basis of this affirmative defense.

B. Sex Discrimination

Sullivan also asserts claims under Title VII and Chapter 151B that MBCR and Bare engaged in impermissible "sex discrimination." The precise nature of these claims, however, is not entirely clear from Sullivan's complaint and briefing. At the hearing on this motion, Sullivan's counsel conceded that the "discrimination" she is alleging in these claims is the hostile work environment created by Bare's conduct, and that these claims are merely duplicative of Sullivan's sexual harassment claims, discussed at length above. Accordingly, there is no reason why they should not be dismissed.

C. Retaliation

Lastly, Sullivan brings claims under Title VII and Chapter 151B that MBCR wrongfully retaliated against her by terminating her employment in response to her sexual harassment complaint against Bare. Title VII makes it unlawful for an employer to retaliate against an employee "for making charges, testifying, assisting, or participating in enforcement proceedings . . . [or for opposing] any practice made an unlawful employment practice by this title." 42 U.S.C. § 2000e-3. Similarly, Chapter 151B

makes it unlawful for an employer "to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter." Mass. Gen. Laws ch. 151B, § 4(4).

Claims for retaliation under both Title VII and Chapter 151B are evaluated according to the three stage *McDonnell Douglas* burden-shifting framework. *See Mariani-Colon v. Dep't of Homeland Sec.*, 511 F.3d 216, 223 (1st Cir. 2007); *Mole v. Univ. of Mass.*, 442 Mass. 582, 591 (2004); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this rubric, the plaintiff carries the initial burden of establishing a prima facie case of retaliation by showing: (1) she engaged in protected conduct under Title VII and Chapter 151B; (2) she suffered an adverse employment action; and (3) a causal connection existed between the protected conduct and the adverse action. *See Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996). Once a prima facie showing has been made, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. *Id.* If the defendant articulates a non-retaliatory reason, "the ultimate burden falls on the plaintiff to show that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant's retaliatory animus." *Id.*

Sullivan has clearly met the first two prongs of

demonstrating a prima facie retaliation case: (1) she engaged in protected conduct on December 8, 2004, by notifying Michael James that Bare was sexually harassing her at the Middleborough facility; (2) she suffered an adverse employment action on January 18, 2005, when Richard Herz issued a formal Decision Letter resulting in her termination. The third prong - showing a causal connection - is more problematic in this case. Sullivan points out that MBCR's Notice of Formal Investigation, which initiated the disciplinary proceedings against her, was sent less than two weeks after her initial harassment complaint. The First Circuit has held that in some cases, mere "temporal proximity" is sufficient at the prima facie stage to satisfy the plaintiff's "relatively light burden" of showing causation. *Mariani-Colon*, 511 F.3d at 224. Defendants argue that any implied causation from the timing of the notice is undermined by the fact that the notice heavily relied on reports filed by Bare and Jackie MacNeil several days prior to Sullivan's harassment complaint to James. *See Walker v. City of Holyoke*, 523 F. Supp. 2d 86, 113 (D. Mass. 2007) ("[I]f an employer has set a course of action regarding employee discipline, it need not change that course of action because a Title VII claim has been made against it.") (internal quotation omitted). Nevertheless, because Sullivan's disciplinary hearing and the ultimate decision to terminate her employment occurred relatively soon *after* her protected conduct,

I find that Sullivan has demonstrated a prima facie case of retaliation.

In the second stage of the *McDonnell Douglas* framework, Defendants must articulate a legitimate, non-retaliatory reason for the adverse employment action. Defendants contend that Sullivan was terminated as a result of her continuing unauthorized absenteeism and her failure to perform her job duties at a satisfactory level. It is undisputed that Sullivan's history of absenteeism prior to her encounters with Paul Bare had resulted in a twenty-five day suspension and a "final warning" that her next offense could result in termination. It is also undisputed that prior to her termination, Sullivan left work early without permission on December 2, 2004, failed to complete her duties on December 3, 2004, and ceased showing up for any of her shifts beginning December 8, 2004. Defendants have therefore satisfied the burden of articulating a legitimate, non-retaliatory basis for terminating Sullivan's employment.

The third and final stage of the *McDonnell Douglas* framework is that Sullivan must show Defendants' proffered reason for terminating her was merely pretext for retaliatory animus. Sullivan has presented no evidence indicating that Richard Herz - the MBCR Hearing Officer who conducted the January 6 disciplinary hearing - was himself acting with retaliatory animus when he issued the Decision Letter that led to her termination.

Sullivan's retaliation claim therefore hinges on whether the alleged animus of Paul Bare can be imputed to Herz's decision because Herz relied in part on Bare's account of Sullivan's conduct on December 2 and December 3, 2004.[16]

In *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77 (1st Cir. 2004), the First Circuit confronted the question of "whether corporate liability can attach if neutral decisionmakers, when deciding to terminate an employee, rely on information that is inaccurate, misleading, or incomplete because of another employee's discriminatory animus." *Id.* at 83. The *Cariglia*

[16] Defendants argue that even if Bare committed the alleged acts of sexual harassment against Sullivan, there is no evidence that Bare ever acted with *retaliatory* animus. The First Circuit has explained that "[m]ost often, retaliation is a distinct and independent act of discrimination, motivated by a discrete intention to punish a person who has rocked the boat by complaining about an unlawful employment practice. That is a different animus than the sexual animus that drove the original harassment." *Noviello v. City of Boston*, 398 F.3d 76, 87 (1st Cir. 2005) (citations omitted). Defendants note that Bare filed the negative reports concerning Sullivan's job performance before Sullivan had contacted Michael James to complain about Bare's conduct. Bare's journal indicates, however, that he was aware Sullivan had called her union representative before she left work on December 2, 2004 - the shift Bare allegedly snuck up behind her and said "nice view." Granting all reasonable inferences in favor of Sullivan, it is possible to conclude that Bare already suspected Sullivan had complained about his behavior when he wrote the negative reports about her job performance. Furthermore, by the time Bare testified at Sullivan's disciplinary hearing, he clearly knew that Sullivan had filed a harassment complaint against him. I therefore find there is a genuine issue of material fact as to whether Bare acted with retaliatory animus in providing his account of December 2 and December 3, 2004 to the MBCR decisionmakers who ultimately terminated Sullivan's employment.

court approvingly quoted *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) (Posner, C.J.), for the proposition that

> [t]here is only one situation in which the prejudices of an employee . . . are imputed to the employee who has formal authority over the plaintiff's job. That is where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision. In such a case, the discriminatory motive of the other employee, not the autonomous judgment of the nondiscriminating decision-maker, is the real cause of the adverse employment action.

363 F.3d at 86. In *Wallace*, Chief Judge Posner described this situation as one where the decisionmaking employee "was merely a cat's paw" of the subordinate who acted with an impermissible motive. 103 F.3d at 1400.

On the other hand, where there are sufficient indicia that the decisionmaking employee was not merely a conduit for the animus of another employee, the animus is not imputed to the final decision. *See Thompson v. Coca-Cola Co.*, 522 F.3d 168, 178 (1st Cir. 2008) ("Despite a retaliatory or discriminatory motive on the part of a supervisor who recommends that some adverse action be taken against an employee, a third person's independent decision to take adverse action breaks the causal connection between the supervisor's retaliatory or discriminatory animus and the adverse action.") (*quoting Mole*, 442 Mass. at 598). In other words, "[t]he mere fact that a retaliating supervisor provides

some of the information on which a decision is based . . . does not necessarily mean that the decision maker lacks sufficient independence from the supervisor for these purposes." *Mole,* 442 Mass. at 599. In assessing whether a decisionmaking process was sufficiently independent from an alleged source of bias or retaliatory animus, "courts place considerable emphasis on the decision maker's giving the employee the opportunity to address the allegations in question, and on the decision maker's awareness of the employee's view that the underlying recommendation is motivated by bias or a desire to retaliate." *Id.* at 600. In this case, Herz was clearly aware that Sullivan believed Bare's account of her job performance to be motivated by bias or a desire to retaliate. At the January 6, 2005 disciplinary hearing conducted by Herz, Thomas Murray - Sullivan's union representative - questioned Bare about Sullivan's general allegation in her fax to Michael James of Bare's inappropriate behavior. Murray also argued at the conclusion of the hearing that Bare's inappropriate conduct should be a mitigating factor in Sullivan's unauthorized absences, saying, "Ms. Sullivan is afraid to be alone with Mr. Bare. That's why she left two hours early."

Furthermore, Herz held off on making a disciplinary determination until he had contacted the MBCR's Equal Opportunity and Diversity Office to learn more about Sullivan's claims. Herz

discovered from Michael James that Sullivan had not followed up on her initial complaint by meeting with him or completing the Harassment Complaint form he had sent to her. Herz also learned from checking the MBCR employment records that Sullivan and Bare had only worked together on six days. Weighing this information alongside the allegations in Sullivan's fax to James and Murray's arguments at the disciplinary hearing, Herz concluded that Sullivan's claims of harassment were not credible, and he accordingly issued the Decision Letter that resulted in her termination.

I find that Herz's decisionmaking process involved a sufficiently independent assessment of Sullivan's allegations to break any causal connection between Bare's alleged animus and the termination of Sullivan's employment. Regardless of whether Herz's credibility assessments and conclusions were in fact correct, there is no evidence to suggest that his decision was merely a conduit or a "rubber stamp" for Bare's retaliatory animus. *See Willis v. Marion County Auditor's Office*, 118 F.3d 542, 548 (7th Cir. 1997) (dismissing a Title VII retaliation claim where no reasonable jury could conclude that the decisionmaker "was the unwitting dupe by which [the plaintiff's supervisor] or others were able to retaliate against [the plaintiff]."). It is true that Herz made his decision without hearing Sullivan's side of the story from Sullivan herself, but

that is because Sullivan chose not to attend the January 6 disciplinary hearing or to take any more proactive steps to communicate the substance of her complaints about Bare to Michael James at an earlier stage. Furthermore, Herz had the opportunity at the disciplinary hearing to observe Sullivan's union representative cross-examine Bare regarding the general allegations of Bare's inappropriate behavior in Sullivan's fax to James. In *Walker v. City of Holyoke*, Judge Ponsor found that a decisionmaker in similar circumstances had taken sufficient steps to render an independent assessment of the plaintiff's claims:

> Moreover, the mayor did not blindly accept [the plaintiff's supervisor's] story of the incident; he conducted a hearing at which [the plaintiff] had the opportunity to present her own account (though she chose not to exercise that option), and at which he did hear the testimony of other witnesses. . . . [A] decisionmaker may thus insulate himself from the taint of one biased employee's statement.

523 F. Supp. 2d at 106. *Cf. Cariglia*, 363 F.3d at 87 n.4 (acknowledging that the court might have reached a different result if the plaintiff "had been afforded a meaningful chance to address the allegations against him.").

For these reasons, I find that Herz's disciplinary decision and Sullivan's subsequent termination were not tainted with Bare's alleged retaliatory animus, and I will grant Defendants' summary judgment motion as to Sullivan's retaliation claims.

IV. CONCLUSION

For the reasons set forth more fully above, I DENY Defendants' summary judgment motion as to Sullivan's sexual harassment claims (Counts II, IV, VI), but I GRANT Defendants' summary judgment motion as to Sullivan's sex discrimination claims (Counts I, III, V) and retaliation claims (Counts XI, XII).[17]

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

[17] I also DENY Sullivan's request to be granted costs for defending the summary judgment motion.